Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No._____

IN THE

Supreme Court of the United States

Jose Melendrez, Jr.,

Petitioner,

vs.

Francis E. Seib, Drug Enforcement Administration, Head DEA Agent in charge of Eagle Pass, Texas, in his official capacity; Moses Pena, Drug Enforcement Administration, DEA Agent in Eagle Pass, Texas, in his official capacity; Larry Leon, Drug Enforcement Administration, former DEA Agent in Eagle Pass, Texas, not in San Antonio, Texas, in his official capacity; Tony Quintanilla, former County Investigator of Zapata County, now a U.S. Border Patrol Agent in Fort Hancock, Texas, in his official capacity; Arnoldo Ramos, Sergeant/Investigative Department of Public Safety in Del Rio, Texas, in his official capacity; United States of America,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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In Pro Se

Attorney of Record *Attorney of Record for Petitioner*

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69 pgs

NOW COMES, Jose Melendrez, Jr., In Pro Se, files this **"Petition for Writ of Certiorari"** in good faith. With all due respect to the United States Court of Appeals for the Fifth Circuit and the U.S. District Court in Del Rio, Texas, the following questions presented herein by the Petitioner are undoubtedly clear and concise.

However, the lower Courts have acted deliberately, intentionally and unconstitutionally in **concealing exculpatory evidence**, and have not addressed the Petitioner's case appropriately. The lower Courts in this case have deliberately overlooked the Petitioner's instant case and have mis-apprehended the law that was established in the United States Court of Appeals for the Fifth Circuit in 1965, and other relevant case law.

In addition, the evidence in the record exposes a major "Conspiracy of Official Misconduct" in the Western District of Texas. Moreover, the Petitioner's relevant issues and exhibits entered as evidence to OPPOSE the U.S. Memorandum in Support of Notice of Substitution and Application for Order will clearly undermine the lower Court's decisions. Therefore, the Petitioner presents the following questions:

QUESTIONS PRESENTED FOR REVIEW

I. Whether the U.S. Court of Appeals was in error to AFFIRM the lower courts decision that Plaintiff -

/Appellant/Petitioner's lawsuit or claims were filed under the Federal Tort Claims Act ("FTCA"), 42 U.S.C. & 1983 and Bivens v. Six Unknown named Agents, 403 U.S. 388 (1971).

II. Whether the U.S. Court of Appeals was in error to AFFIRM the lower courts decision that Melendrez's Tort Claim did not require the tolling statute and therefore being time-barred.

III. Whether the U.S. Court of Appeals was in error to AFFIRM the lower courts decision based on HECK RULE.

IV. Whether the U.S. Court of Appeals was in error not to CONSIDER Melendrez's arguments that the district judge should have recused himself.

V. Whether the U.S. Court of Appeals was in error not to ENTERTAIN Plaintiff/ Petitioner's Supplemental Motion.

CERTIFICATE OF INTERESTED PARTIES

These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

Jose Melendrez, Jr., Plaintiff/Appellant/Petitioner

James F. Gilligan, Jr., Assistant United States Attorney, Counsel of Record for Defendants/Appellees, Francis E. Seib, Moses Pena, and Larry Leon

Seth Byron Dennis, Assistant Attorney General, Office of the Texas State Attorney General, Counsel of Record for Defendant/Appellee, Arnoldo Ramos

Jason Bradford Libby and Phillip A. McKinney, Counsels of Record for Defendant/Appellee Tony Quintanilla

St. Paul Insurance Company, Insurer for Defendant/Appellee, Tony Quintanilla

Jose Melendrez, Jr.

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Appendix B — Order Accepting Report and Recommendation of the United States Magistrate Judge filed on the 27th day of July 2001.

Appendix C — Judgment of the United States District Judge Fred Biery filed on the 27th day of July, 2001.

Appendix D — Judgment of the United States Court of Appeals for the Fifth Circuit filed on the 20th day of February 2002.

Appendix E — Attached (exhibit) Letter certifying the Supplemental Motion. Filed on September 24, 2001.

Appendix F — Judgment of the United States Court of Appeals for the Fifth Circuit filed on the 26 day of April, 2002., DENYING Plaintiff/Appellant/Petitioner's Motion for REHEARING EN BANC.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSE MELENDREZ, JR,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

AFFIDAVIT OF MAILING

STATE OF WISCONSIN)
)
) **SS** **SUPREME COURT**
) **RULE 29**
)
COUNTY OF WINNEBAGO)

Jose Melendrez, Jr., having been first duly sworn according to law, deposes and says:

That he is the petitioner in the above captioned case and the deponent herein.

That the deponent on the 07 day of May 2002 mailed his

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. D, infra) is not reported. The opinion of the United States District Court (App. C, infra) is also not reported.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on February 20, 2002 (App. D, infra). The Petitioner applied for rehearing en banc. The Petition for a Writ of Certiorari is filed on May ___7___, 2002. The Court has jurisdiction under 28 U.S.C. Section 1254 (1). In addition, the Plaintiff/Appellant/Petitioner submits that the Petition for Writ of Certiorari has been properly commenced within the statutory time period as set forth by Rule 13 (1) of the Federal Rules of the Supreme Court of the United States of America.

STATUTORY PROVISION INVOLVED

28 U.S.C. Sections 2401(b) and 28 U.S.C. 2680 (h), and 28 U.S.C. 1346 (b) established by an Act of Congress provides that the Federal Tort Claims Act (FTCA) is the exclusive remedy for such claims against federal employees whom are in violation of

the Constitution or laws of the United States of America.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the U.S. Constitution provides that in all criminal or civil proceedings, the Plaintiff/Appellant shall have protection of his due process rights in any civil or criminal proceeding as his defense.

STATEMENT OF THE CASE

1. With respect to this lawsuit, Plaintiff/Appellant/Petitioner started his administrative remedy from 1997 all the way thru January 2000 by writting letters to the Defendants and FBI, U.S. District Attorney's Office in Texas, and U.S. Attorney General in Washington, D.C., complaining about his bad treatment by the Defendants.

2. When no actions have been taken by those officials who are supposed to answer to my complaint, Plaintiff/Appellant/Petitioner filed an administrative lawsuit pursuant to 28 U.S.C. 2401(b) and 28 U.S.C. 2680(h) based on abuse of process, and negligent misrepresentation, on June 20, 2000.

3. On July 18, 2000, notice was given to Plaintiff/Appellant/Petitioner by Aleta Bodolay, Paralegal

Specialist, Torts Branch, Civil Division, Washington, D.C. that his administrative lawsuit was received and commenced on June 27, 2000.

4. On August 11, 2000, Bettie E. Goldman, Associate Chief Counsel, Washington, D.C. made a response on behalf of the Defendants.

5. On August 7, 2000 Plaintiff/Appellant/Petitioner made a reply to the Defendants' response to his administrative lawsuit.

6. On November 2, 2000 Plaintiff/Appellant/Petitioner sent a notice to Ms. Bettie E. Goldman, the Attorney for Defendants that if a final decision is not made within the six-month time frame the Plaintiff/Appellant/Petitioner will file in U.S. District Court the lawsuit against Defendants no later than January 2, 2001.

7. No final decision has been made within the six-month time limitation allowed by 28 U.S.C. 2401, on this date the civil lawsuit is filed in Federal Court against the afore-mentioned Defendants.

8. On August 27, 2001, Plaintiff/Appellant/Petitioner files

his instant appeal against the Respondent/Appellee United States after the U.S. District Court for the Western District of Texas dismissed the Plaintiff/Appellant/Petitioner's lawsuit.

9. On February 20, 2002, The United States Court of Appeals for the Fifth Circuit dismissed Plaintiff/Appellant's lawsuit and AFFIRMED the lower courts decision.

10. On March 1, 2002, Plaintiff/Appellant/Petitioner filed an Original Petition for rehearing En Banc, and was denied on April 26 2002.

11. On May 07, 2002, the Plaintiff/Appellant/Petitioner files this instant Original Petition for Writ of Certiorari for the Courts judicial review.

STATEMENT OF THE FACTS

1. On December 1992, the Plaintiff was released on parole (six months left) from the Missouri Correctional facility (Boonville) to the custody of the State of Texas Law Enforcement to answer to a detainer (theft case). The Plaintiff was released from Bexar County Jail with the Help of his Attorney Mr. Carlos Martinez on two-thousand dollar bail bond. The Plaintiff returned to his home town in Crystal city, Texas to await trial.

2. The Plaintiff reported regularly to his Parole Officer in Del Rio, Texas, or Crystal City on certain occasions. The Plaintiff violated his parole on several occasions by getting dirty urinalysis(cocaine). The Parole Officer, (to the knowledge of the Plaintiff), never violated the Plaintiff by reporting to the State of Missouri, or the Texas authorities where the Plaintiff was out on parole and bond.

3. On March or April of 1993, the Plaintiff(Jose Melendrez Jr.) And Pedro Gutierrez were arrested by U.S. Border Patrols, and then referred to County Investigators in Zapata County, Tony Quintanilla headed the Investigation. They were asked to cooperate or go to prison because the investigator knew the Plaintiff was on Parole from Missouri, and bond from the State of Texas.

They cooperated and released the next morning.

4. I, Since I had a contract with County Investigator, Tony Quintanilla to work for him as his informant, consequently, I joined in March or April of 1993 the Guadalupe Garza's Drug Conspiracy as an informer and not as a confederate to further the scheme.

5. From March thru November of 1993, the Plaintiff was pressured into retrieving information on drug dealers by the County Investigator, the Plaintiff then met Guadalupe Garza on March or April of 1993 in Pearsal, TX. Where they became mutually aquainted. With orders and authorization of the County Investigator the Plaintiff was participating in undercover operations in the South Western District of Texas where 176 kilos of Marijuana and two automobiles were seized by U.S. Border Patrols and DEA Agents from Eagle Pass, Texas. The Plaintiff was referred to Arnoldo Ramos Sgt/Inv. Department of Public Safety in Del Rio, Texas, by Tony Quintanilla where the Plaintiff reported the marijuana load. The operation was a success and the Plaintiff received a thank you and to continue to look for drug dealers.

6. The Plaintiff was then subpeonaed, to testify in Del Rio, Texas, on the same load he had reported to Sgt/Inv.

Department of Public Safety, Arnoldo Ramos. The Plaintiff was then coached by Sgt./Inv. Arnoldo Ramos and U.S. District Attorney into misleading the grand jury by saying that he did not know about Guadalupe Garza's involvement with drug trafficking, and that the Plaintiff had just borrowed the truck to Guadalupe Garza to fix it. And it worked! The Federal Grand Jury never found out that I was the informant in the case, and it left me in a position to keep on working.

7. On November of 1993, the Plaintiff with orders and authorization of the County Investigator (Tony Quintanilla) continued to retrieve information on drug dealers in and out of the United States (Republic of Mexico). All this happened before I was even arrested on this case conspiracy to distribute marijuana with Guadalupe Garza.

8. On November of 1993, the Plaintiff (not being in the possession of the marijuana)was arrested by the Drug Enforcement Administration in Eagle Pass, Texas. (Special Agent Tapia, Larry Leon, and Francis E. Seib) for scouting the road for Guadalupe Garza. The Plaintiff explained he was working for the County Investigator (Tony Quintanilla) but the DEA was not interested, not unless, if I cooperated with their agency.

I was arrested and released that same day after giving a signed statement to the DEA, and took an oath not to disclose to anybody what I was doing for the DEA. I was also advised that they wanted Guadalupe Garza with as much marijuana as possible, not matter what the cost, (the DEA did not report this incident or arrest to the Texas authorities where the Plaintiff was already under Bond Restrictions).

9. After a couple of weeks I was constantly called and visited by Agent Tapia asking for information on drug dealers. Agent Tapia advised that the U.S. Attorney needed some cases or else they were going to pull the plug on the operation.

10. After a couple of weeks stressful meetings with DEA Agents, in January 1994, the Plaintiff finally got a drug deal in San Antonio, TX. There the Plaintiff participated with State and Federal Law Enforcement Agencies from Eagle Pass, TX and San Antonio, TX, in the seizure of 10 ounces of cocaine and one automobile. The Plaintiff was given a thank you and to resume working as an informant.

11. On or about the beginning of 1994, the Plaintiff also gave information to the DEA on County Investigator Domingo Moncada on weapons and marijuana dealings in Crystal City, and Eagle Pass, Texas. The information was good!

The County Investigator was arrested by the DEA and other law enforcement agencies in Crystal City, Texas.

12. The Plaintiff was advised to keep trying Guadalupe Garza on retrieving more information on drug loads. From January 1994 thru January 25, 1995. The Plaintiff was successful again on retreiving information on several occasions and incriminating other individuals in marijuana drug smuggling into the United States. The Plaintiff at times not at the crime scenes still reported hearsay and signed statement on several occasions.

13. On July 1994, the Plaintiff also participated in driving a marijuana load from Eagle Pass, Texas, to Pearsal, Texas with the assistance of State and Federal Law Enforcement agencies from (Eagle Pass, TX)(Pearsal, TX)and (San Antonio, TX) where more than 150-kilos of marijuana were seized. The Plaintiff was given a thank you and a two-thousand dollar pay-check from the Drug Enforcement Administration in Eagle Pass, Texas. (Special Agent Larry Leon).

14. On August of 1994, the Plaintiff asked the DEA Agent Larry Leon and Francis E. Seib for a letter of recommendation for his work as an informant to present to the 290th District court (Judge Sharron MaCrae)

in San Antonio, Texas, where the Plaintiff was placed on probation for 10 years for theft in Bexar County. The letter was not even considered by the Judge Sharron MaCrae, the advice from the Plaintiff's Attorney (Carlos Martinez) was that the DEA had not helped in anyway, as far as his work, as an informant was concerned.

15. The DEA did not ask the State of Texas, the 290th District Court and the Probation Office (Jan Taylor) for permission or authorization to use the Plaintiff as an informant during his time on bond for theft, and bond from Zapata, Texas, and his placement of probation.

16. On January 25, the Plaintiff participated in another marijuana load, where the Plaintiff called DEA Agent Francis E. Seib and Agent Moses Pena in Eagle Pass, Texas, and advised them that Guadalupe Garza was in town with another load.

17. The Plaintiff related the information on where and when, and the DEA missed the load
but managed to arrest Guadalupe Garza on Illegal entry into the United States.

18. On January 25, the Plaintiff was advised to report to Eagle Pass, TX to give a statement on the overall undercover

operation since March or April of 1993 thru January 25, 1995. The Plaintiff and the controlling Agent Larry Leon and another Federal Law Enforcement Officer (as a witness) signed and dated the statement.

19. On July 1995, the Plaintiff was arrested in North Dakota, with an indictment form Del Rio, TX, charging the Plaintiff with Count: (1) Possession with intent to Distribute Marijuana.
Count (2) Conspiracy Possession with intent to Distribute a quantity of Marijuana with Guadalupe Garza, Patricia Rodriguez, Miguel Reynaga, Rodolfo Rodriguez and others between 1993 and January 1995.

20. The Plaintiff attended a Detention Hearing in Fargo, North Dakota where the Honorable U.S. Magistrate Judge (Karen Klein) presided, the Plaintiff fought extradition to Texas and won on the grounds of conflicting testimony of the DEA Special Agent Moses Pena.

21. The Plaintiff was released to the Halfway House in Fargo, North Dakota where he resided until he was scheduled to appear in U.S. Court in Del Rio, Texas.

22. On December of 1995, the Plaintiff Pleaded guilty to that Conspiracy Possession with intent to Distribute a quantity

of Marijuana, and was sentenced to 84 months in prison.

REASONS FOR GRANTING THE WRIT

42 U.S.C. & 1983 and Bivens v. Six Unknown named Agents, 403 U.S. 388 (1971).

Under 42 U.S.C. & 1983 and Bivens v. Six Unknown named Agents, 403 U.S. 388 (1971), falls within the ambit of 28 U.S.C. 1331, and when Defendants are acting in their individual capacity.

Consequently, the Honorable Judges of the Fifth Circuit Court of Appeals were in PLAIN-ERROR and CONTRAVENTION with Plaintiff/Appellant/Petitioner's instant civil lawsuit and appeal. The Plaintiff/Appellant/Petitioner filed a FEDERAL TORT CLAIM , under the **FEDERAL TORT CLAIMS ACT, SECTIONS 28 U.S.C. 2401 (b) AND 2680 (h) BASED ON ABUSE OF PROCESS AND NEGLIGENT MISREPRESENTATION AGAINST FEDERAL OFFICIALS AND/OR EMPLOYEES ACTING IN THEIR OFFICIAL CAPACITY.** ***See Plaintiff/Appellant's Original Complaint under JURISDICTIONAL STATEMENT, in which, the Plaintiff/Appellant gave the court jurisdiction as a driving element under the Federal Tort Claims Act, Sections 28 U.S.C. 2401 (b) and 2680 (h) based on abuse of process and negligent misrepresentation and federal officials acting in their official capacity.***

The Plaintiff/Appellant/Petitioner did not give the district court jurisdiction under 42 U.S.C. A. & 1983, and Plaintiff/Appellant/Petitioner has no idea how the district court arrived at that conclusion.

Therefore, the U.S. Court of Appeals for the Fifth Circuit were in PLAIN-ERROR in ADOPTING AND AFFIRMING THE LOWER COURTS DECISION.

In addition, the U.S. Court of Appeals for the Fifth Circuit is in ***CONTRAVENTION*** with the law that was established in the U.S. Court of Appeals for the Fifth Circuit in 1965, **(Citing *Sears v. United States, 343 F.2d 139 (5th Cir. 1965)*,** in which, the ***SEARS RULE*** clearly states ***that as "it takes two to conspire" there can be no indictable conspiracy with a government informant.***

Moreover, the evidence in the record clearly shows that the Plaintiff/Appellant/Petitioner was a confidential informant.

Therefore, the district court was in plain-error in Substituting the United States for the individual named Defendants because the law did not allow the named Defendants to charge or undertake any criminal conspiracy investigation against Plaintiff/Appellant. In addition, the U.S. Court of Appeals for the Fifth Circuit were also in plain-error in affirming the district courts decision on their final judgment on page 2, paragraph 2, with respect to the SUBSTITUTION MOTION.

TOLLING THE STATUTE OF LIMITATIONS

In ***Irwing v. Department of Veterans Affair, 498 U.S. 89, 996 (1990),*** **the Supreme Court held that equitable tolling is permissible where the claimant has actively pursued his judicial remedies by filing "defective pleading during the statutory period, or where the complainant has been induced or tricked by the adversary's misconduct into allowing the filing deadline to pass.**

Consequently, the U.S. Court of Appeals for the Fifth Circuit did not review the Plaintiff/Appellant/Petitioner's Exhibits entered as evidence to oppose the U.S. Memorandum and Application for Order and Substitution Motion because if the U.S. Court of Appeals would have thoroughly revised the Exhibits #12, #14, #15,, #16, #17, #18, #19, #20, it would have clearly shown the ***INDUCEMENT, TRICKERY, DECEIT, AND MISLEADING STATEMENTS MADE BY THE UNITED - STATES ATTORNEYS OFFICE IN SAN ANTONIO, TEXAS, INTO ALLOWING THE STATUTE OF LIMITATIONS TO PASS AND INTO BELIEVING THAT THE GOVERNMENT/U.S. ATTORNEYS OFFICE WOULD EVENTUALLY HELP THE PLAINTIFF/APPELLANT AS TIME PERMITTED. (See also, Plaintiff/Appellant's Opening Brief on pages 20 and 21.***

With this in mind, "IF" the U.S. Supreme Court thoroughly revises the Plaintiff/Appellant's exhibits and case law, with respect to the Substitution Motion, it will clearly distinguish the governments' misconduct into allowing the filing deadline to pass.

Therefore, the lower courts were in plain-error in affirming the lower court decision.

HECK RULE

In ***Heck v. Humphrey, (1994) 512 U.S. 477, 129 L.Ed. 383, 114 S.Ct. 2364,*** the majority states clearly that Justice Souter's discussion of Abuse of Process, post, 494-495, 129 L.Ed.2d, at 399, does not undermine this principle. ***It is true that favorable termination of prior proceedings is not an element of that cause of action - but neither is an impugning of those proceedings one of its consequences. The gravamen of that tort (ABUSE OF PROCESS) is not the wrongfulness of that prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends. Id at 394 note 7(b).***

Therefore, with this in mind the Plaintiff/Appellant/Petitioner spells out the definition of **ABUSE OF PROCESS** from the **LAW OF TORTS, BY MR. WILLIAM L. PROSSER.**

ABUSE OF PROCESS differs from MALICIOUS PROSECUTION in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. CONSEQUENTLY, IN AN ACTION FOR ABUSE OF PROCESS IT IS UNNECESSARY FOR THE PLAINTIFF TO PROVE THAT THE PROCEEDING HAS TERMINATED IN HIS FAVOR, OR THAT THE PROCESS WAS OBTAINED WITHOUT PROBABLE CAUSE OR IN THE COURSE OF A PROCEEDING BEGUN WITHOUT PROBABLE CAUSE.

In addition, on page 2, paragraph 1, on the Judges final judgment affirming the lower courts decision, the Judges for the U.S. Court of Appeals clearly present and state that the Plaintiff/Appellant/Petitioner ***NOW SEEKS DAMAGES UNDER THE "FTCA" ON GROUNDS THAT THE DEFENDANTS COMMITTED TORTS OF ABUSE OF PROCESS AND NEGLIGENT MISREPRESENTATION, WHICH IS TRUE, AND ON THE FACE OF THE PLAINTIFF/APPELLANT'S ORIGINAL COMPLAINT UNDER (JURISDICTIONAL STATEMENT) IT CLEARLY ESTABLISHES THAT FOR THE RECORD.***

However, the Judges for the Fifth Circuit Court of Appeals are ***AFFIRMING THE LOWER COURTS DECISION BASED ON HECK RULE, CONSEQUENTLY, HECK RULE FALLS WITHIN THE AMBIT OF MALICIOUS PROSECUTION AND PLAINTIFF/ APPELLANT/PETITIONER DID NOT FILE UNDER MALICIOUS PROSECUTION AND THE JUDGES FOR THE FIFTH CIRCUIT COURT OF APPEALS ARE IN CONFLICT AND MISAPPREHENDING PLAINTIFF/APPELLANT'S ORIGINAL COMPLAINT AND APPEAL, AND CLEARLY CONTRADICTING THEMSELVES WITH RESPECT TO THE ABOVE-MENTIONED SCENARIO, FACTS, AND THE JUDGES OWN STATEMENT ON PAGE 2, PARAGRAPH 1, WITH RESPECT TO THE JUDGES FINAL JUDGEMENT.***

Therefore, with this being said the Judges for the U.S. Court of Appeals for the Fifth Circuit were in PLAIN-ERROR in affirming the lower courts decision based on ***HECK RULE AND ANY BIVENS CLAIMS UNDER 42 U.S.C.A & 1983, WITH RESPECT TO MALICIOUS PROSECUTION.***

JUDGES RECUSAL

With respect to disqualification of justice, judge, or magistrate. 28 U.S.C. Section 455(b)(1) provides that he shall also disqualify himself in the following circumstances where he has a

personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

Interm of personal knowledge of disputed facts concerning the proceeding, however, Plaintiff/Appellant Jose Melendrez, Jr., outlines that he had pleaded guilty before Judge Fred Biery whereas the evidentiary facts concerning the criminal proceedings are related to the facts in questions with respect to his civil lawsuit. One can be said, in avoiding redundance, that the facts extracted from the sentencing proceedings are paralleled to the plea proceedings because Judge Fred Biery was the presiding judge over all of the afore-mentioned proceedings.

It should be noted that Plaintiff/Appellant addressed the issues of recusal before the judge, and the adversary party was aware of the allegations. In the U.S. Memorandum in Support of Substitution and Application for Order, filed on March 16, 2001, furthermore, on the United States of America motion to dismiss or, in the alternative motion for Summary Judgment, filed on March 23, 2001, additionally, was also mentioned on the Objection Motion to the Report and Recommendation of the U.S. Magistrate Judge (Dennis Green).

Therefore, the Judges were in plain-error in not entertaining Plaintiff/Appellant's argument with respect to "recusal"

SUPPLEMENTAL MOTION

With respect to the SUPPLEMENTAL MOTION, on February 20, 2002, the Honorable Fifth Circuit Court of Appeals entered judgment under Fed. R. App. R. 36 and AFFIRMED the lower courts DECISION on all the issues presented therein, however, on February 20, 2002, the U.S. Court of Appeals for the Fifth Circuit ALSO entertained a new issue that enlightens the case before the eyes of the Supreme Court. This new issues is the Plaintiff/Appellant's Motion to Supplement the Record on Appeal which was DENIED.

Consequently, Motion to Supplement the record on appeal is the base and foundation of Plaintiff/Appellant's lawsuit. The evidence provided therein, proves, certifies, and establishes for the record that the lower courts committed errors in law and are currently involved in the manipulation of the JUDICIAL SYSTEM.

As of thus the issues presented by the Plaintiff/Appellant on his appeal have not been properly addressed or correctly revised.

Consequently, the Plaintiff/Appellant/Petitioner has no other recourse but to correctly address the issues before this Honorable Supreme Court of the United States of America.

And with all due respect to the Honorable Judges of the Fifth Circuit Court of Appeals and the Honorable Clerk of Court for the Fifth Circuit Court of Appeals, the Plaintiff/Appellant will prove, clarify, certify and establish for the record that the Honorable Judges of the Fifth Circuit Court of Appeals and the Honorable Clerk of Court for the Fifth Circuit Court of Appeals are **CONTRADICTING THEMSELVES AND ARE OVERLOOKING, MISAPPREHENDING, MIS-PLACING AND ARE IN CONFLICT WITH PLAINTIFF/APPELLANT'S MOTION TO SUPPLEMENT THE RECORD.**

Therefore, the Plaintiff/Appellant will state, certify and establish for the record, and to the U.S. Supreme Court that Plaintiff/Appellant's instant civil lawsuit, and the evidence presented, herein, PROVES that the Honorable Judges of the Fifth Circuit Court of Appeals and the lower courts were NOT FAIR or CORRECTLY MOTIVATED to ENTERTAIN Plaintiff/Appellant's instant civil Lawsuit/case.

With this being said and stated for the record, the Plaintiff/Appellant/Petitioner will attach additionally exhibits, in regards, to the SUPPLEMENTAL MOTION filed by the Plaintiff/Appellant/Petitioner on September 28, 2001, to prove that the judges were not fair.

First of all, the Honorable Judges of the Fifth Circuit Court of Appeals, Honorable Judges ***KING, JOLLY AND DeMOSS*** all stated for the RECORD and their FINAL JUDGMENT that Melendrez Also filed a motion to supplement the record. However, the items he offers in supplementation are already in the record. His motion to supplement is DENIED.

Consequently, the Honorable Judges of the Fifth Circuit Court of Appeals are in CONFLICT with the Honorable Deputy Clerk of Court, Ms. Lisa Conrad for the Fifth Circuit Court of Appeals. (See Plaintiff/Appellant/Petitioner's attached exhibit Appendix E for verification).

It should be noted for the RECORD that the Honorable Deputy Clerk of Court, Ms. Lisa Conrad for the Fifth Circuit Court of Appeals filed on September 24, 2001, a notice to Plaintiff/Appellant Jose Melendrez Jr., advising the Plaintiff/Appellant that the district court in Del Rio, Texas, Del Rio Division, Western District of Texas, claimed that Plaintiff/Appellant/Petitioner had not filed or entered exhibits. And if the Plaintiff/Appellant wished to SUPPLEMENT THE RECORD ON APPEAL he should file a motion specific to that relief which complies in every aspect with Fed. R. App. P. 27 (a)(2)(A). You should attach any documents with which you wish to supplement the record to your motion.

With this being stated for the record, the Honorable

Judges of the Fifth Circuit Court of Appeals are in PLAIN-ERROR in DENYING Plaintiff/Appellant's Motion to Supplement the Record on Appeal, in addition, the Honorable Judges *CANNOT CLAIM* that the ITEMS Plaintiff/Appellant OFFERED on his SUPPLEMENTATION MOTION are already in the record because the ITEMS the Plaintiff/Appellant OFFERED on his SUPPLEMENTATION MOTION, according to the Honorable Deputy Clerk Lisa Conrad for the Fifth Circuit Court of Appeals, and the District Court in Del Rio, Texas, Del Rio Division, Western District of Texas, THE EXHIBITS (29-TOTAL ENTERED AS EVIDENCE TO OPPOSE THE U.S. MEMORANDUM IN SUPPORT OF NOTICE AND APPLICATION FOR ORDER AND SUBSTITUTION MOTION), WERE NEVER ENTERED. (SEE PLAINTIFF/APPELLANT'S ORIGINAL MOTION TO SUPPLEMENT THE RECORD.

Consequently, there seems to be some ***CHICANERY*** in the **UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, DEL RIO DIVISION, DEL RIO, TEXAS AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN NEW ORLEANS, LOUISIANA. The EVIDENCE** provided herein by Plaintiff/Appellant **PROVES AND CERTIFIES** Plaintiff/Appellant's allegations and claims.

In addition, the EVIDENCE (29-EXHIBITS) presented by the Plaintiff/Appellant on his SUPPLEMENTAL MOTION are the base and foundation of Plaintiff/Appellant's case, and when read in a liberal fashion it certifies and proves the Plaintiff/Appellant's case against all of the named Defendants herein.

Moreover, the evidence presented herein on the Supplemental Motion by the Plaintiff/Appellant puts the Honorable Judges of the Fifth Circuit Court of Appeals in CONTRAVENTION with the SAME LAW that was established in the ***UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN 1965, IN WHICH, THE SEARS RULE CLEARLY STATES THAT "AS IT TAKES TWO TO CONSPIRE" THERE CAN BE NO INDICTABLE CONSPIRACY WITH A GOVERNMENT INFORMER WHO SECRETLY INTENDS TO FRUSTRATE THE CONSPIRACY. Citing Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965). In addition, the Fifth Circuit Court of Appeals REVERSED the Defendants CONVICTION.***

It is quite obvious that the Honorable Judges of the Fifth Circuit Court of Appeals and the lower district court **DID NOT** address the Plaintiff/Appellant's complaint/Appeal ***APPROPRIATELY***. Therefore, the Plaintiff/Appellant/Petitioner asks and requests the U.S. Supreme Court to ***ENTERTAIN*** the Writ before the eyes of this Honorable Court.

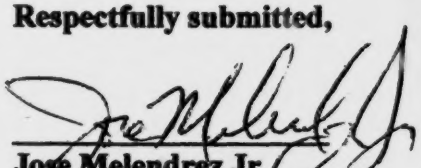
CONCLUSION

WHEREFORE PREMISES CONSIDERED,

Plaintiff/Appellant respectfully requests the U.S. Supreme Court to thoroughly review the instant matter whether the U.S. Court of Appeals for the Fifth Circuit overlooked or misapprehended Plaintiff/Appellant/Petitioner's claims and allegations. If errors in the law were committed or misapprehended by the U.S. Court of Appeals for the Fifth Circuit Court of Appeals, in essence, Plaintiff/Appellant respectfully requests the U.S. Supreme Court to **REVERSE** the U.S. Court of Appeals (FIFTH CIRCUIT) **DECISION** and remand the case back with instructions to the district court.

DATED: May 7, 2002

Respectfully submitted,



Jose Melendrez Jr.
745 Appleton Rd.
Menasha, WI 54952
IN PRO SE

CERTIFICATE OF SERVICE

This is to certify that a true copy of the Plaintiff/ Appellant/Petitioner's Jose Melendrez Jr's., **"Original Petition for Writ of Certiorari"** was mailed on the date indicated below to the following persons:

Mr. Robert L. Pittman
United States Attorney
Mr. James F. Gilligan Jr.
Assistant United States Attorney
Western District of Texas
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216

Attorneys for Appellees:
Francis E. Seib
Larry Leon
Moses Pena

Mr. Phillip A. McKinney
McKinney & Rodriguez-Barrera
Attorney at Law
Professional Corporation
615 N. Upper Broadway (78477)
P.O. Box 2747
Corpus Christi, Texas 78403-0303

Attorney for Appellee:
Tony Quintanilla

Mr. Seth Byron Dennis
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711

Attorney for Appellee:
Arnoldo Ramos

The original and 40 copies of the same material have been mailed by U.S. Postal Service and Certified Returned Receipt on the date indicated below to the Honorable Clerk of Court for the Supreme Court of the United States.

Dated: May 07, 2002

Jose Melendrez Jr.

IN PRO SE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

Jose Melendrez, Jr.,	)	
Plaintiff,	)	
	)	CAUSE NO:
v.	)	DR-01-CA-01-FB/DG
	)	
	)	Filed June 28, 2001
United States of America,	)	Clerk U.S. District Court
Tony Quintanilla, and	)	By Nona C.
Arnoldo Ramos,	)	Deputy Clerk
Defendants.	)	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Before the court is a motion to dismiss and/or for summary judgment filed by Defendant United States America (document 11), and motions to dismiss filed by Defendants Tony Quintanilla (document 7) and Arnoldo Ramos (document 3). After reviewing the defendants' motions, the plaintiff's response and the relevant law, this Magistrate Judge recommends that the motions be granted and that the case be dismissed.

Discussion

Substitution

The United States has filed a notice of substitution and supporting memorandum (document numbers 9 and 10)

asking the court to dismiss Defendants Francis E. Seib, Moses Pena, and Larry Leon from this lawsuit and substitute the United States as the sole, proper defendant as to any common law tort claims raised in this lawsuit against its employees. Title 28 U.S.C. & 2679(d)(1) provides in full:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States District Court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

The authority for making such a certification has been delegated by the Attorney General to the United States Attorneys. 28 C.F.R. & 15.3(a)(2000). Through John F. Paniszczyn, Chief of the Civil Division Office of the United States Attorney of the Western District of Texas, see document number nine, the United States Attorney has certified under 28 U.S.C. & 2679(d)(1) that DEA agents Francis E. Seib, Moses Pena, and Larry Leon acted within the scope of their employment at the time of the events at issue,

thereby substituting the United States as the defendant on those claims. See Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 420 (1995).

Motion for Summary Judgment

Beginning with the motion for summary judgment file d by the United States, the Court notes that under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that, as a matter of law, the movant is entitled to judgment. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994. "[T]he substantive law will identify which facts are material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Only disputes about material facts will preclude the granting of summary judgment. Id. In a motion for summary judgment, the burden is on the movant to prove that no genuine issue of material fact

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The United States also moved to dismiss based on the plaintiff's failure to effect proper service on the United States pursuant to Rule 4(i) of the Federal Rules of Civil Procedure. But in view of the fact that the Plaintiff's claims are clearly barred under the limitations provisions of the FTCA, the court will not address this issue.

exists. Latimer v. Smithkline & French Lab., 919 F.2d 301, 303 (5th Cir. 1990). If the non-movant bears the burden of proof at trial, the summary judgment movant need not support its motion with evidence negating the non-movant's case. Rather, the movant may satisfy its burden by showing that there is an absence of evidence to support the non-movant's case. Id. See also Little, 37 F.3d at 1075. Once the movant meets its burden, the non-movant must show that summary judgment is not appropriate. Little, 37 F.3d at 1075 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). "This burden is not satisfied with 'some metaphysical doubt as to material facts,'... by conclusory allegations,' ... by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." Id. (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.,' Matsushita, 475 U.S. at 587 (quoting Fed.R. Civ. P. 56(e)). To determine whether a genuine issue exists for trial, the court mist view all of the evidence in the light most favorable to the non-movant, and the evidence msut be sufficient such that a reasonable jury could return a verdict for the non-movant. Anderson, 477 U.S. at 477 U.S. at 248; Munoz v. Orr, 200 F.3d 291, 302 (5th Cir. 2000).

The United States moves for summary judgment on the grounds that Melendrez's tort claims are barred because they were not presented in writing to the appropriate federal agency within two years after the claim accrued. A prerequisite to the commencement of an action against the United States in federal court is the presentment of an administrative claim. Brown v. Nations Bank Corp., 188 F.3d 579, 589-90 (5th Cir. 1999). Under the Federal Tort Claims Act (FTCA), a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal Agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. & 2401(b). A cause of action under federal law accrues within the meaning of section 2401(b)" ' when the plaintiff knows or has reason to know of the injury which is the basis of the action.'" Brown, 188 F.3d at 589-90 (quoting Moore v. McDonald , 30 F.3d 616, 620-21 (5th Cir. 1994)). In Brown, the Fifth Circuit ruled that the Plaintiff's knowledge of his injury depends upon two elements: " (1) the existence of the injury; and (2) the connection between the

injury and the defendant's actions." 188 F.3d at 590 (citing Piotrowski v. City of Houston , 51 F.3d 512, 516 (5th Cir. 1995))." Moreover, a plaintiff need not have actual knowledge" of the injury "if the circumstances would lead a reasonable person to investigate further." Piotrowski, 51 F.3d at 516 (citations omitted).

Melendrez argues that DEA personnel falsely and maliciously recommended to the federal prosecutors that the plaintiff should be prosecuted and convicted on conspiracy charges even though the DEA defendants knew that he was working as a government informant. The plaintiff further alleges that this constituted an abuse of his constitutional right to due process. Melendrez states that he was arrested in North Dakota in July 1995 based on an indictment issued from the Western District of Texas, Del Rio Division, which charged him with one count of possession with intent to distribute and one count of conspiracy. He pleaded guilty in December of 1995 to one count of conspiracy to possess with the intent to distribute a quantity of marijuana, and was sentenced on June 10, 1996 to 84 months in prison. The Plaintiff signed his claim for Damage, Injury or Death on June 20, 2000. Under the most liberal construction of events, Melendrez's claim therefore accrued on Jule 10, 1996, and he

had two years thereafter to file an administrative claim. Melendrez, however, did not file his claim until June 20, 2000, which was two years beyond the statute of limitations deadline and four years from the accrual of his cause of action.

Although principles of equitable tolling apply to the statute of limitations under the FTCA, Perez V. United States, 167 F.3d 913, 917 (5th Cir. 1999) Melendrez's circumstances do not justify their use. In Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990), the Supreme Court held that equitable tolling is permissible :where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." In this case, however, there is no indication that Melendrez attempted to pursue a judicial remedy during the statutory period, nor is there any indication the United States "induced or tricked" the plaintiff into allowing the statute of limitations to pass. Accordingly, the plaintiff's tort claims against the United States are barred under the FTCA, and summary judgment should be entered in favor of the United States.

Motions to Dismiss

Turning to the motions to dismiss filed by Defendants Tony Quintanilla and Arnoldo Ramos, the court notes that Rule 12(b)(6) dismissals are granted only when it appears beyond doubt the plaintiff can prove no set of facts in support of his claim which would entitle him to relief:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove not set of facts in support of his claim which would entitle him to relief.

See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The court must accept the allegations in the complain as true and construe those allegations in a light most favorable to the party asserting them. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Cinel v. Comnick, 15 F.3d 1338, 1341 (5th Cir. 1994). At a minimum, the Federal Rules of Civil Procedure require "a short and plain statement of the claim" that "will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."Conley, 355 U.S. at 47 (quoting Fed.R.Civ.R.8(a)(2)). "However,'[d]ismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief.'" Blackburn v. City of Marshall , 42 F.3d 925, 931 (5th Cir. 1995).

To the extent that Melendrez is attempting to assert a 1983 claim for damages against Defendants Tony Quintanilla and Arnoldo Ramos, or a Bivens claim against Francis E. Seib, Moses Pena, and Larry Leon, see Stephenson v. Reno, 28 F.3d 26, 27-28 (5th Cir. 1994) (applying limitation of Heck v. Humphrey to Bivens-type action against federal officials), the court notes that in Heck v. Humprey, 512 U.S. 477, 486-87(1994), the United States Supreme Court held that

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by action whose unlawfulness would render a conviction or sentence invalid, a & 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of

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> Bivens v. Six Unknown Named agents, 403 U.S. 388 (1971). Habeas corpus, 28 U.S.C. & 2254. A claim for damages that relationship to a conviction or sentence that has not been so invalidated is not cognizable under & 1983.

(Emphasis in original). In addition to Bivens actions, Heck has been applied in a number of other situations. See, e.g., Edwards V. Balisok, 520 U.S. 641 117 S.Ct. 1584, 1588, 137 L.Ed.2d 906 (1997)(disciplinary proceedings involving the deprivations of good-time credits). Hamilton v. Lyons, 74 F.3d 99, 103 (5th Cir. 1996)(interpreting Heck to prevent accrual of & 1983 claims that would necessarily imply the invalidity of convictions on pending criminal charges); Littles v. Board of Pardons and Paroles

Division, 68 F.3d 122, 123 (5th Cir. 1995) (Parole-revocation proceeding).

> In this instance, the crux of the plaintiff's complaint is that Larry Leon, Francis Seib, Moses Pena, Tony Quintanilla, and Arnoldo Ramos violated the plaintiff's constitutional rightto due process on the grounds of abuse of process and misrepresentation when [they] investigated and recommended to the United States Prosecutor to prosecute and convict the Plaintiff on conspiracy with Guadalupe Garza, Juana Patricia Rodriguez, and others to distribute marijuana on or about March or April of 1993 through January 25, 1995 when the defendants allegedly knew that in accordance with established law Plaintiff as a Government Informant could not have conspired with Guadalupe garza, Juana Patricia Rodriguez, and others, whose individuals were the target of jointly Federal/State investigations.

The Plaintiff's complaint seeks five million dollars in monetary damages. If this court were to grant damages for the plaintiff's claims, such a ruling would necessarily implicate the validity of his criminal conviction or sentence. See Heck, 512 U.S. at 487. Accordingly, under Heck, the plaintiff must first demonstrate that his conviction or sentence has been reversed, invalidated, or expunged prior to bringing an action under 42 U.S.C. & 1983. He has not done so. Since there is no indication that an authorized tribunal or executive body has overturned or otherwise invalidated the plaintiff's conviction, and a civil rights action, if successful, would necessarily imply the invalidity of the plaintiff's conviction or sentence, his damage claims against Tony

Quintanilla, Arnoldo Ramos, Francis Seib, Moses Pena, and Larry Leon are not cognizable under section 1983 or Bivens and should be dismissed pursuant to Rule 12(b)(6).

Recommendations

(1) Pursuant to 28 U.S.C. 7 2679(d)(1), Defendants Francis Seib, Moses Pena, and Larry Leon should be dismissed from this lawsuit and all pleadings, motions, and papers filed in this action should henceforth reflect that the United States of America is substituted as the named defendant in lieu of Francis Seib, Moses Pena, and Larry Leon.

(2) After thoroughly reviewing the pleadings and record, the undersigned recommends that the motion for summary judgment filed by the United States (document 11) should be GRANTED.

(3) The motion to dismiss filed by Defendant Tony Quintanilla (document 7) should also be GRANTED.

(4) The motion to dismiss filed by Defendant Arnoldo Ramos (Document 3) should also be GRANTED.

(5) The Plaintiff may wish to file objections to these recommendations. Failure to file written objections to the findings and recommendations contained in these report within ten(10)days

from the date of its receipt shall bar an aggrieved party from receiving a de novo review by the District Court of the findings and recommendations contained herein, see 28 U.S.C. & 636(b)(1)(C), and shall bar an aggrieved party "except upon grounds of plain error from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court. See Douglas v. United Services Automobile Ass'n, 79 F.3d 1415 (5th Cir. 1996). The Clerk shall mail copies of this report to the parties, return receipt requested.

SIGNED on this 27 of June, 2001.

Dennis G. Green
U.S. Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

JOSE MELENDREZ, JR.,	)	Filed July 27, 2001
	)	Clerk U.S. District Court
Plaintiff,	)	By Nona C.
	)	Deputy Clerk
VS.	)	
	)	CIVIL ACTION NO:
UNITED STATES OF AMERICA,	)	DR-01-CA-01-FB
TONY QUINTANILLA, and	)	
ARNOLDO RAMOS,	)	
	)	
Defendants.	)	

ORDER ACCEPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The Court has considered the Report and Recommendation of the United States Magistrate Judge filed in the above styled and numbered cause on June 28, 2001, and Plaintiff Jose Melendrez, Jr., "objects" to the Report and Recommendation of the United States Magistrate Judge filed July 13, 2001.

Where no party has objected to a Magistrate Judge's Report and Recommendation, the Court need not conduct a de novo review of them. See 28 U.S.C. & 636(b)(1) ("a judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made"). In such cases, the Court need only

review the Report and Recommendation and determine whether they are either clearly erroneous or contrary to law. United States v. Wilson, 864 F.2d 1219, 1221 (5th. Cir), cert. Denied, 492 U.S. 918 (1989).

On the other hand, any report or recommendation to which there are objections requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. Battle v. United States Parole Commission, 834 F.2d 419, 421 (5th Cir. 1987).

The Court has reviewed the objections and has conducted a de novo review of the Magistrate Judge's Report and Recommendation and finds the objections to the Magistrate Judge's Recommendation are without merit. This Court hereby accepts, approves, and adopts the Magistrate Judge's factual findings and legal conclusions contained in the Report and Recommendation filed June 28, 2001. The Report and Recommendation of the United States Magistrate Judge shall therefore be accepted pursuant to 28 U.S.C. & 636(b)(1) such that:(1) the Notice of Substitution and Application for Order thereon filed by the United States of America is the proper party defendant as to any common law torts raised in this suit against its employees and therefore, defendants Francis Seib, Moses Pena, and Larry Leon should be dismissed from this lawsuit and all

pleadings, motions and papers filed shall henceforth reflect that the United of America is substituted as the named defendant in their stead;(2) the motion for summary judgment(docket #11) filed by the United States of America should be GRANTED; (3) the motion to dismiss (docket #7) filed by defendant Tony Quintanilla should be GRANTED, and (4) the motion to dismiss (docket #3) filed by defendant Arnoldo Ramos should also be GRANTED.

Accordingly, it is hereby ORDERED that the Recommendation of the United States Magistrate Judge, filed in this case on June 28, 2001(docket #23), is ACCEPTED such that:(1) the Notice of Substitution and Application for Order Thereon filed by the United States of America (docket #9) is GRANTED such that defendants Francis Seib, Moses Pena, and Larry Leon are DISMISSED from this lawsuit pursuant to 28 U.S.C. & 2679(d)(1), and all pleadings, motions and papers filed shall henceforth reflect that the United States of America is substituted as the named defendant in their stead;(2) the motion for summary judgment(docket #11)filed by the United State of America if GRANTED; (3) the motion to dismiss (docket #7) filed by defendant Tony Quintanilla is GRANTED, and (4) the motion to dismiss (docket #3) filed by defendant Arnoldo Ramos is GRANTED. IT IS FURTHER ORDERED that this case is DISMISSED. Motions pending, if any, are also dismissed.

It is so ORDERED.

SIGNED this 26 day of July 2001.

FRED BIERY
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

JOSE MELENDREZ, JR.,	) FILED JULY 27, 2001
	) CLERK U.S.DISTRICT COURT
Plaintiff,	) By Nona C.
	)
VS.	) CIVIL ACTION NO:
	) DR-01-CA-01-FB
UNITED STATES OF AMERICA, TONY QUINTANILLA, and ARNOLDO RAMOS	)
	)
Defendants.	)

JUDGMENT

The Court considered the Judgment to be entered in the above-styled and numbered cause. Consistent with the Order Accepting Report and Recommendation of the United States Magistrate Judge filed in this cause on this same date.

It is hereby ORDERED, ADJUDGED and DECREED that defendants Francis Seib, Moses Pena, and Larry Leon are DISMISSED from this case pursuant to 28 U.S.C. & 2679(d)(1) and the United States of America is substituted as the named defendant in their stead; the motion for summary judgment filed by the United States of America is GRANTED, the motion to dismiss filed by defendant Tony Quintanilla is GRANTED, the motion to dismiss filed by defendant Arnoldo Ramos is

GRANTED, and this case is DISMISSED. Motions pending, if any, are also DISMISSED.

It is so ORDERED.

SIGNED this 26 day of July, 2001

FRED BIERY
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL,. 504-310-7700
600 CAMP STREET
NEW ORLEANS, LA 70130

February 20, 2002

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 01-50786 Melendrez v. Seib
USDC. No. DR-01-CV-1

Enclosed is a copy of the court's decision. The Court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P.'s 39 through 41, and 5th Cir. RULES 35, 39, and 41 govern cost, rehearings, and mandates. 5th Cir. RULES 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order. Please read carefully the Internal Operating Procedures (IOP"S) following Fed.R.App.P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41. Provides that a motion for a stay of mandate under Fed. R. App.P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Case. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed.R.App.P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Sincerely,

Charles R. Fulbruge III, Clerk

By_:_____
Joseph Armato, Deputy Clerk

Enclosure
Mr. Jose Melendrez Jr.
Mr. James F. Gilligan Jr.
Mr. Jason Bradford Libby
Mr. Seth Byron Dennis

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-50786
Summary Calender

U.S. Court of Appeals
FILED
FEB 20, 2002
Charles R. Fulbruge
III., Clerk

JOSE MELENDREZ, JR.,

Plaintiff - Appellant,

versus

Francis E. Seib, Drug Enforcement Administration, Head DEA Agent in charge of Eagle Pass, Texas, in his official capacity; Moses Pena, Drug Enforcement Administration, DEA Agent in Eagle Pass, Texas, in his official capacity; Larry Leon, Drug Enforcement Administration, former DEA Agent in Eagle Pass, Texas, not in San Antonio, Texas, in his official capacity; Tony Quintanilla, Former County Investigator of Zapata County, now a U.S. Border Patrol Agent in Fort Hancock, Texas, in his official capacity; Arnoldo Ramos, Sergeant/Investigative Department of Public Safety in Del Rio, Texas, in his official capacity; UNITED STATES OF AMERICA,

Defendants - Appellees.

Appeal from the United States District Court
For the Western District of Texas
USDC No. DR-01-CV-1

Before KING, Chief Judge, and JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:

Jose Melendrez, Jr., federal prisoner # 06688-059, appeals the dismissal of his claims brought against state and federal law-enforcement defendants under the Federal Tort Claims Act ("FTCA"), 42 U.S.C. & 1983, and Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Melendrez pleaded guilty to a drug trafficking conspiracy charge and was sentenced to prison in 1996. He now seeks damages under the FTCA on grounds that the defendants committed torts of abuse of process and negligent misrepresentation by recommending his prosecution on the conspiracy charge while he was a confidential informant.

The district court correctly substituted the United States for the individual federal defendants with respect to FTCA claims. 28 U.S.C. & 2679(d); Rodriguez v. Sarabyn, 129 F.3d 760, 764 (5th Cir. 1997). The District Court also correctly dismissed the FTCA claims as time barred. Melendrez failed to show that he had provided the defendants with adequate notice of his claim with-in two years of its accrual as required by the FTCA. 28 U.S.C. & 2401(b);

Montoya v. United States, 841 F.2d 102, 104 (5th Cir. 1988). Melendrez also failed to show any trickery or inducement by the defendants that caused him to delay filing his FTCA claim, and he therefore is not entitled to equitable tolling of the limitation period. See Perez v. United States, 167 F.3d 913, 914 (5th Cir. 1999).

The district court correctly determined that Melendrez's &1983 Claims were barred by Heck v. Humphrey, 512 U.S. 477 (1994). Melendrez's damages all arise from his alleged wrongful prosecution and imprisonment, so that his present action necessarily implies that his conviction is invalid. Wells v. Bonner, 45 F.3d 90, 94 (5th Cir. 1995). Accordingly, Melendrez was required to show that his conviction had been set aside or overturned in order for his civil rights action to accrue.

Wells, 45 F.3d at 94. The district court also correctly applied Heck to any Bivens claims that might remain against the federal defendants. Stephenson v. Reno, 28 F.3d 26, 27 (5th Cir. 1994). The Bivens and & 1983 claims were correctly dismissed. Their Dismissal is "with prejudice to their being asserted again until the Heck conditions are met." Johnson v.

McElveen, 101 F.3d 423, 424 (5th Cir. 1996).

We decline to consider Melendrez's arguments that the district judge should have recused himself, because Melendrez did not properly seek recusal in the district court. See United States v. Sanford, 157 F.3d 987, 988-89 (5th Cir. 1998). The district court's judgment is AFFIRMED.

Melendrez has also filed a motion to supplement the record. However, the items he offers in supplementation are already in the record. His motion to supplement is DENIED.

In his brief, appellee Tony Quintanilla has asked for an award of costs for a frivolous appeal. Because he did not file a separate motion as required by Fed. R. App. P. 38, we refuse to consider the request.

DISMISSAL AFFIRMED; MOTION DENIED.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

September 24, 2001

Mr. Jose Melendrez Jr.
Federal Prison Camp Duluth
#06688-059 d.207/208
P.O. Box 1000
Duluth, MN 55814

No. 01-50786 Melendrez v. Seib
USDC No. DR-01-CV-1

We received your motion to verify if all exhibits entered as evidence are in the record on appeal. The district court has advised that no exhibits were entered. If you wish to supplement the record on appeal you should file a motion specific to that relief which complies in every aspect with Fed. R. App. P. 27(a)(2)(A). You should attach any documents with which you wish to supplement the record to your motion.

Sincerely,

CHARLES R. FULBRUGE

III, CLERK

By:_____

Lisa Conrad, Deputy Clerk

504-589-6514 ITCM #163

Ms. Britannia Ingrid Hobbs
Mr. Phillip A McKinney
Mr. Seth Byron Dennis

BR-9

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-50786

U.S. COURT OF APPEALS
FILED
APRIL 26, 2002
CHARLES R. FULBRUGE
III, CLERK

JOSE MELENDREZ, JR.,

Plaintiff - Appellant

v.

Francis E. Seib, Drug Enforcement Administration, head DEA agent in charge in Eagle Pass, Texas, in his official capacity; Moses Pena, Drug Enforcement Administration, DEA Agent in Eagle Pass, Texas, in his official capacity; Larry Leon, Drug Enforcement Administration, former DEA Agent in Eagle Pass, Texas, not a DEA Agent in San Antonio, Texas, in his official capacity; Tony Quintanilla, former County Investigator of Zapata County, now a US Border Patrol Agent in Fort Hancock, Texas, ih his official capacity; Arnoldo Ramos, Sergeant/Investigative Department of Public Safety in Del Rio, Texas, in his official capacity; UNITED STATES OF AMERICA

Defendants - Appellees

Appeal from the United States District Court for the
Western District of Texas, Del Rio

ON PETITION FOR REHEARING EN BANC

(Opinion 2/20/02 5 Cir.,_____,_____F.3d_____)

Before KING, Chief Judge, and JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed.R.App.P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed.R.App.R. and 5th Cir. R. 35), the Petition for Rehearing En Banc is Denied.

ENTERED FOR THE COURT:

NOT LEGIBLE
UNITED STATES CIRCUIT JUDGE

Supreme Court U.S.
FILED
JUN 21 2002
OFFICE OF THE CLERK

NO. 01-1794

IN THE
Supreme Court of the United States

JOSE MELENDREZ, JR., ***Petitioner***

V.

FRANCIS E. SEIB, Drug Enforcement Administration, Head DEA Agent in Charge of Eagle Pass, Texas, in His Official Capacity; **MOSES PENA,** Drug Enforcement Administration, DEA Agent in Eagle Pass, Texas, in His Official Capacity; **LARRY LEON,** Drug Enforcement Administration, Former DEA Agent in Eagle Pass, Texas, Not in San Antonio, Texas, in His Official Capacity; **TONY QUINTANILLA,** Former County Investigator of Zapata County, Now a U.S. Border Patrol Agent in Fort Hancock, Texas, in His Official Capacity; **ARNOLDO RAMOS,** Sergeant/Investigative Department of Public Safety in Del Rio, Texas, in His Official Capacity; **UNITED STATES OF AMERICA,** ***Respondents.***

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT, TONY QUINTANILLA'S, BRIEF IN OPPOSITION

Phillip A. McKinney, State Bar No. 13723200
McKINNEY & RODRIGUEZ-BARRERA, P.C.

Attorney and Counsel of Record for Respondent,
Tony Quintanilla

NO. 01-1794

IN THE
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RESPONDENT, TONY QUINTANILLA'S, BRIEF IN OPPOSITION

Phillip A. McKinney, State Bar No. 13723200
McKINNEY & RODRIGUEZ-BARRERA, P.C.

Attorney and Counsel of Record for Respondent,
Tony Quintanilla

QUESTIONS PRESENTED

1. Can Petitioner maintain a late-filed cause of action where there is no evidence that any defendant mislead him as to his filing deadline and thus no evidence to trigger a tolling provision?

2. Did the courts below properly interpret the legal basis for the Petitioner's alleged causes of action?

3. Can Petitioner maintain a cause of action against Respondent Quintanilla for claims involving wrongful conviction and incarceration without first showing that the conviction and sentence have been reversed, expunged, declared invalid, or otherwise called into question by court issuance of a writ of habeas corpus?

4. Can Petitioner complain that a trial judge should have recused himself without filing a proper motion to that effect?

5. Can Petitioner complain about the denial of a motion to supplement the record without first showing that the proposed supplemental material is not already filed in the record and would have a material effect on the outcome of the case?

CORPORATE DISCLOSURE STATEMENT

Respondent, Tony Quintanilla does not dispute the list of parties provided by the Petitioner, but offers this Corporate Disclosure Statement for his insurer, St. Paul Fire & Marine Insurance Co. ("SPFM"). SPFM is a wholly owned subsidiary of The St. Paul Companies.

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RESPONDENT, TONY QUINTANILLA'S, BRIEF IN OPPOSITION

Respondent, Tony Quintanilla, files this Brief in Opposition praying that this Court deny the Petition for Writ of Certiorari complaining of the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case February 20, 2002.

REASONS FOR DENYING THE WRIT

Petitioner's case was dismissed for procedural reasons and because, on its face, it failed to state a proper claim. Petitioner has failed to demonstrate to this Court that the judgment was legally or factually wrong on the issues decided. Rather, at this stage, Petitioner seeks to bypass these dispositive issues and try the case on the merits of his allegations. Thus the Petition for Writ of Certiorari is misdirected and fails to sustain any appellate burden of proof.

A. The Claim is Barred by Limitations

Before a claim can be filed in the federal courts, where it alleges a cause of action against the United States, the claimant must exhaust administrative remedies. *Brown v.*

NationsBank Corp., 188 F.3d 579, 589-90 (5th Cir. 1999). To do so, the claimant must present the claim in writing to the appropriate agency within two years after the accrual of the claim. 28 U.S.C. § 2401(b). The claimant may then file suit within six (6) months after the administrative claim is denied. *Id.*

Petitioner's claim is based upon an alleged wrongful conviction. He pled guilty to a crime and was sentenced to incarceration no later than June 10, 1996. *See generally, Brown, supra* at 589-90 (discussing criteria for "accrual" of a cause of action). Therefore, he had until June 10, 1998 to present his written claim to the appropriate federal agency. This he failed to do.

Despite his representations in paragraph 1 of his Statement of the Case, Petitioner did not present a proper written complaint to any agency until June 20, 2000, more than two years after limitations expired.

Consequently, Petitioner claims that he is entitled to equitable tolling under *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990). While equitable tolling is available in instances where the claimant files a defective pleading or is induced or tricked by his adversary into allowing the filing deadline to pass, Petitioner has not shown himself to fall within that rule.

First, all of the Petitioner's allegations of trickery go to the issue of his initial conviction. Thus the representations made in the Petitioner's Statement of Facts paragraphs 1 through 21, while certainly subject to dispute, are irrelevant to the issues to be decided by this Court.

Second, there is no evidence that Petitioner tried to make a legal claim within the two-year limitations period. Without any such evidence, Petitioner could not defeat summary judgment in favor of the United States on limitations.

B. The Courts Below Properly Construed Petitioner's Allegations.

Petitioner, in less than precise language, sued Respondents for violation of his due process rights. The Respondents include local and federal law enforcement agents, specifically sued in their respective official capacities. It is undisputed that Tony Quintanilla, at all relevant times, was not a federal employee, but a local law enforcement agent. Therefore, the Federal Tort Claims Act, which addresses the liability of the federal government and its employees, does not provide Petitioner with a theory of liability against Quintanilla. 28 U.S.Ç. § 2671.

Rather, the only liability theory available to Petitioner arose through 42 U.S.C. § 1983. In this Court and in the courts below, Petitioner has repeatedly argued that he did not sue Quintanilla under § 1983. Therefore, he should be deemed to have waived any such claim. In such case, he no longer has any cause of action against Quintanilla.

Even if he were to try to construct such a claim at this time, it would fail under the *Heck* rule as briefed herein.

C. Petitioner Has No Tort Claim So Long As Conviction Stands.

Petitioners claims are all necessarily related to his conviction and sentence of incarceration. That is his only claimed injury. It is well-settled that one cannot make a claim based on an alleged wrongful conviction unless he can show that the conviction was reversed on appeal, expunged, declared invalid or otherwise called into question by issuance of a writ of habeas corpus. *Heck v. Humphrey*, 512 U.S. 477 (1994).

Petitioner argues that the *Heck* rule is limited to causes of action based upon a malicious prosecution theory because innocence of the crime is an element of malicious prosecution, but is not an element of an abuse of process theory. But the rationale for *Heck* is that the conviction "constitutes a final

judgment on the matter which bars th[e] civil suit." *Wells v. Bonner*, 45 F.3d 90 (5th Cir. 1995).

Where Petitioner voluntarily pled guilty to the crime and has not demonstrated any legal effort to reverse or invalidate that guilty plea and conviction, let alone success in that effort, he is precluded from a collateral attack on that conviction by seeking tort damages in a civil proceeding that necessarily implies the invalidity of the conviction. *Heck*, *supra*.

D. No Entitlement to Recusal Absent Proper Motion.

If a party believes that a judge has a personal bias or prejudice that compromises his ability to preside over the case, that party must file a timely motion seeking recusal and a notice of appeal regarding any denial of the motion in order to preserve error. *See generally*, Fed. R. Civ. P. 7(b)(1); *McKethan v. Texas Farm Bureau*, 996 F.2d 734, 744 (5th Cir. 1993). Petitioner did not file such a motion, did not obtain a ruling, and did not file a notice of appeal preserving a complaint. Therefore, he is not entitled to the relief now requested on appeal. *See generally*, Fed. R. App. P. 3(c)(1)(B).

Petitioner argues that he "addressed the issue" and that references to it appear in other court documents. However, without a motion, ruling, and notice of appeal, discussions and oblique references are of no legal consequence.

E. There Was No Need to Supplement the Record.

The Fifth Circuit denied the Motion to Supplement the Record, reciting that the material sought to be added was already in the record. Petitioner has not demonstrated the factual inaccuracy of the Fifth Circuit's recital.

While he attaches a letter indicating that the trial court clerk and the appellate court clerk communicated and determined that there were no "exhibits" for the record, he has not demonstrated that the materials were not in the record as something other than what the trial court clerk would term "exhibits."

Furthermore, Petitioner has failed to demonstrate any harmful error in the unlikely event that his complaint is something more than a mere failure to communicate or semantic confusion. He has not shown that anything in the materials he sought to supplement would cause the court to arrive at a different ruling on the motion for summary judgment

or motions to dismiss. Thus he has not shown himself entitled to any relief from this Court.

PRAYER

For the reasons stated, certiorari should be denied and Respondent, Tony Quintanilla so requests.

Respectfully submitted,



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ATTORNEYS AND COUNSEL OF RECORD FOR RESPONDENT TONY QUINTANILLA

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Respondent's, Tony Quintanilla's, Brief in Opposition was served on all counsel of record by placing three copies of same in the United States Mail, first class, postage prepaid, on the date indicated below, addressed as follows:

Mr. Jose Melendrez, Jr. — Petitioner, *pro se*
745 Appleton Rd.
Menasha, WI 54952

Mr. Robert L. Pittman — Attorneys for Respondents
United States Attorney — Francis E. Seib
Mr. James F. Gilligan, Jr. — Larry Leon
Assistant United States Attorney — Moses Pena
Western District of Texas — United States of America
601 N.W. Loop 410, Suite 600
San Antonio, TX 78216

Mr. Seth Byron Dennis — Attorney for Respondent
Assistant Attorney General — Arnoldo Ramos
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Austin, TX 78711

Dated: 6/10, 2002.

Phillip A. McKinney

(3)

Supreme Court, U.S.
FILED
JUL 8 2002
OFFICE OF THE CLERK

No. 01-1794

IN THE

Supreme Court of the United States

Jose Melendrez, Jr.,

Petitioner,

vs.

Francis E. Seib, Drug Enforcement Administration, Head DEA Agent in charge of Eagle Pass, Texas, in his official capacity; Moses Pena, Drug Enforcement Administration, DEA Agent in Eagle Pass, Texas, in his official capacity; Larry Leon, Drug Enforcement Administration, former DEA Agent in Eagle Pass, Texas, not in San Antonio, Texas, in his official capacity; Tony Quintanilla, former County Investigator of Zapata County, now a U.S. Border Patrol Agent in Fort Hancock, Texas, in his official capacity; Arnoldo Ramos, Sergeant/Investigative Department of Public Safety in Del Rio, Texas, in his official capacity; United States of America,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF IN OPPOSITION TO RESPONDENT TONY QUINTANILLA

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In Pro Se

Attorney of Record *Attorney of Record for Petitioner*

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the U.S. Court of Appeals was in error to AFFIRM the lower courts decision that Plaintiff - /Appellant/Petitioner's lawsuit or claims were filed under the Federal Tort Claims Act ("FTCA"), 42 U.S.C. & 1983 and Bivens v. Six Unknown named Agents, 403 U.S. 388 (1971).

II. Whether the U.S. Court of Appeals was in error to AFFIRM the lower courts decision that Melendrez's Tort Claim did not require the tolling statute and therefore being time-barred.

III. Whether the U.S. Court of Appeals was in error to AFFIRM the lower courts decision based on HECK RULE.

IV. Whether the U.S. Court of Appeals was in error not to CONSIDER Melendrez's arguments that the district judge should have recused himself.

V. Whether the U.S. Court of Appeals was in error not to ENTERTAIN Plaintiff/ Petitioner's Supplemental Motion.

REPLY BRIEF OF PETITIONER

The Petitioner hereby submits his REPLY BRIEF in the above- captioned matter.

FIRST ISSUE

The Petitioner "OBJECTS" to Respondent, Tony Quintanilla's "BRIEF IN OPPOSITION", on pages 1,2. and 3 on Paragraph (A). **The Claim is Barred by Limitations.**

ARGUMENT

With respect to the tolling of statute of limitations the Petitioner cited several case law and presented evidence to support his allegations, but the lower Courts did not review or examine the Petitioner's relevant cited case law and evidence in the record..

Therefore, the Petitioner Cites Taliaferro v. Dykstra, 388 F. Supp. 957 (1975) and Mizell V. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970) in addition, this case law was cited on EXHIBIT # 15, entered as evidence to oppose the U.S. Memorandum and Application for order and Substitution Motion. In addition, the above-mentioned case law was cited by the Petitioner on Page 6, and 7 on the Petitioner's "OBJECTIONS" to the REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE (DENNIS GREEN).

Moreover, on the above-mentioned case law it clearly states, in the matter at bar, the Court finds Plaintiff Schotta began,

even prior to the official termination of her employment by VPI on June 6, 1971, to pursue the only administrative remedy then available to her. Moreover, throughout the ensuing nearly two-year period prior to instituting this action, **she made numerous attempts to accelerate the investigation HEW had undertaken in response to her complaint. The Court also finds that the DEFENDANTS were PLACE ON NOTICE of the INVESTIGATION no later than November 8, 1971, the day on which defendants were FURNISHED a copy of Plaintiff Schotta's complaint upon the arrival of HEW'S investigators on the campus. Citing Taliaferro v. Dykstra, 388 F. Supp. 957 (1975) and Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970)citing Burnette v. New York Central R. Co., 380 U.S. 424, 428, 85 S.Ct.1050, 1054, 13 L.Ed.2d 941 (1965). See Also Exhibit #14** and #15, entered as EVIDENCE to oppose the U.S. Memorandum and Application for Order and Substitution Motion, in which , EXHIBIT #14 presents a pattern of **misleading statements made by the United States Attorneys Office in San Antonio, Texas., into allowing the filing deadline to pass. And consequently, the Petitioner was led to believe that the U.S. Attorney's Office would eventually help the Petitioner as time permitted. (See Exhibit #14 - consists of 10 pages of responses made by the U.S. Attorney's Office in San Antonio, Texas.** In addition, the Defendants were placed on notice of Petitioner's complaint on June 5, 1997 less than a year after the Petitioner was imprisoned. See Also Exhibit #14 and Exhibit #18

to prove the Petitioner's allegations and claims. Moreover, there are responses from the U.S Attorney's Office in San Antonio, Texas dated April 8, 1999 and July 12, 1999, in which it clearly states that **"Mr. Sepeda will look into the matters you allege as time permits. As I told your sister, the Del Rio Division likely will prosecute more than 1,000 defendants during 1999. Mr. Sepeda or someone in his office will eventually respond to your letter.** With this in mind , the Petitioner was surely being mislead induced and tricked by the adversary party into believing that Petitioner's case and allegations were surely going to be investigated. Therefore, Petitioner was forced to file the instant civil action a year later after waiting for the U.S.Attorney's Office to RESPOND to Petitioner's claims and allegations.

Wherefore, the Petitioner followed the same pattern of enunciated principles on the above-mentioned case law and followed the "ONLY ADMINISTRATIVE REMEDY AVAILABLE TO THE PETITIONER AT THAT POINT IN TIME". However, the lower Courts did not review or examine the evidence in the record. The evidence in the record (29-total exhibits entered as evidence to OPPOSE the U.S. Memorandum and Application for Order and Substitution motion is being cited on every OPPOSING DOCUMENT FILED by the Petitioner in the instant case, and was cited to avoid redundance in the lower Courts and now will also be cited in the U.S. Supreme Court to prove and certify the Petitioner's allegations and claims against all of the Defendants..

In addition, the Opposing counsels' for all of the Named Defendants in the instant civil action never OPPOSED or OBJECTED to the Petitioner's 29-total exhibits entered as evidence to OPPOSE the U.S. Memorandum and Application for Order and Substitution Motion and were all served with this evidence via-certified mail. See also, Petitioner's Motion to Supplement the Records (Certified Receipt and Certificate of Service).

With respect to Respondent Tony Quintanilla's claims on page 2, paragraph 1 on Respondent's Brief in Opposition, the Petitioner "OBJECTS", the U.S. Attorney's Office was still INVESTIGATING the Petitioner's case on April 8, 1999 and July 12, 1999, according to the U.S. Attorney's Office in San Antonio, Texas, (Citing Exhibit #14), and was deliberately and intentionally being mislead (induced, tricked) by the adversary party into believing that the Petitioner's case was being investigated.(Citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990).

In any event, "IF" the U.S. Attorney's Office in San Antonio, Texas would have terminated the investigation on July 12, 1999, the Petitioner would still have ample time (July 12, 2001) to file the instant civil action because the case was still being investigated, but since the U.S. Attorneys Office never filed or denied the Petitioner's claims and allegations the U.S. Attorney's Office in San Antonio, Texas and Del Rio, Texas were clearly misleading the Petitioner in the instant case.

In addition, the Petitioner did file a written complaint to the appropriate federal agency with-in the two-year statute of limitations period(June 5, 1997) with-in a year of Petitioner's conviction(June 6, 1996), in this case, the U.S. Attorney's Office in San Antonio, Texas and Del Rio, Texas. (Citing Exhibit #14 and Exhibit #18).

Consequently, the Petitioner's claims are based on **Abuse of Process and Negligent Misrepresentation** because the law was established in the **Fifth Circuit Court of Appeals** in 1965, which clearly states that there can be no indictable conspiracy with a government informer (Citing SEARS V. UNITED STATES 343 F.2d 139 (5th Cir.1965). If the Law was well established since 1965 not to convict the Petitioner of Conspiracy to Distribute Marijuana with Gusdalupe Garza and others it was foreseeable not only to the Defendants but to the U.S. Attorney's Office, U.S. Magistrate Judge, and the U.S. District Judge not to convict the Petitioner on a conspiracy charge, however, the Defendants and the lower courts deviated from the enunciated principles set-forth in Sears v. United States, 343 F.2d 139(5th Cir.1965), and that is why the Petitioner is charging the Defendants with **Abuse of Process and Negligent Misrepresentation**. (See also Exhibit #1).

Consequently, there is no record that the Defendants and lower Courts **opposed, objected, or ruled on** the Petitioner's above-mentioned case law. And have deliberately overlooked the Petitioner's claims, allegations and relevant case law.

SECOND ISSUE

With respect to Respondent Tony Quintanilla's Brief in Opposition, the Petitioner "OBJECTS" on pages 3 And 4 Paragraph (B) The Courts below Properly construed Petitioner's allegations.

ARGUMENT

Consequently, Defendant Tony Quintanilla claims that no theory of liability was made against him by the Petitioner and therefore should be deemed to have waived any such claim. In such case, he no longer has any cause of action against Quintanilla.

Consequently, Respondent Tony Quintanilla is very well mistaken and it is clear that Quintanilla did not read the Petitioner's arguments on Petitioner's Jose Melendrez Jr's Opposition to Defendant Tony Quintanilla's Original Answer on pages 17, 18, and 19 paragraph (23). In which, it clearly addresses Quintanilla's involvement with federal law enforcement agencies (lending credebility to the governments case against the Petitioner). In addition, Respondent Quintanilla was working in concert with the DEA Government agents and the Petitioner cited several case law starting with Thompson v. United States, cite as 504 F. Supp 1087 (1980), Martarano v. United States, 231 F. Supp 805 (D.Nev. 1964), and United States v. N.A. Degerstrom, Inc. 408 F.2d 1130 (th Cir. 1969), which falls within the ambit of 28 U.S.C.A && 1346(b), 2671. To support Petitioner's claims and allegations.

Consequently, the lower courts did not review, examine, or ruled on whether Respondent Tony Quintanilla was working as an "Employee of the Government", in addition, there is no record that the lower courts ever questioned Quintanillas involvement in the instant case, however, the lower Courts did manage to state that Petitioner was trying to assert a 28 U.S.C.A & 1983 claim against Respondent Tony Quintanilla, when in reality, the Petitioner never did file under 1983. The Petitioner raised the ISSUE that Respondent Tony Quintanilla was an "Employee of the Government", as OPPOSED to a 1983 Civil Action.

THIRD ISSUE

With respect to Respondent Tony Quintanilla's Brief in Opposition, the Petitioner "OBJECTS" on page 4 and 5 paragraph C. Petitioner has no Tort Claim so long as conviction stands.

ARGUMENT

With respect to HECK RULE , Heck v. Humphrey, (1994), 512 U.S. 477, 129 L.Ed.. 383, 114 S.Ct 2364m the majority states clearly that Justice Souter's discussion of abuse of process, post, at 494-495, 129 L.Ed., at 399, does not undermine this principle. It is true that favorable termination of prior proceedings is not an element of that cause of action - but neither is an impugning of those proceedings one of its consequences. The gravamen of that tort (Abuse of Process) is not the wrongfulness of that prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends. ID. At 394 NOTE 7(b).

That's exactly the Petitioner's Jose Melendrez Jr., instant civil lawsuit is based on abuse of process where the Defendants deviated from the instructions of Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965) (Fifth Circuit Court of Appeals). **Not to seek an indictment against the Petitioner Jose Melendrez Jr., based on Conspiracy with Guadalupe Garza and said others. In addition, the Petitioner cited HECK RULE on Petitioner's Petition for Writ of Certiorari on page 16, 17 and 18.**

Therefore, the Petitioner would ask the U.S. Supreme Court to correctly interpret the TORTS of Abuse of Process and Malicious Prosecution for the Defendants and the lower Courts because the Petitioner has repeatedly explained the differences on the Petitioner's "OBJECTIONS" to the Report and Recommendation of the United States Magistrate Judge on pages 14 and 15. See Also Petitioner's Petition for Writ of Certiorari on pages 16, 17, and 18. In addition, on Petitioner's Reply Brief in the U.S. Court of Appeals on page 8 paragraph 2,3,4,and 5.

Consequently, the Respondent Tony Quintanilla is very well mistaken because under Abuse of Process the Petitioner has a Tort Claim and has a legal claim against all of the named Defendants in this case and **does not have to prove that his conviction has been terminated in his favor.**

FOURTH ISSUE

With respect to Respondent Tony Quintanillas Brief in

Opposition, the Petitioner "OBJECTS" on page 5 and 6 paragraph (D). No entitlement to Recusal Absent Proper Motion.

ARGUMENT

This argument is well argued on Petitioner's Petition for Writ of Certiorari on Pages 18 & 19.

FIFTH ISSUE

With respect to Respondent Tony Quintanillas' Brief in Opposition, the Petitioner "OBJECTS" on pages 6 and 7 paragraph E. There was no need to supplement the Record.

ARGUMENT

This Argument is well argued on Petitioner's Petition for Writ of Certiorari on pages 20, 21, 22, 23 and 24. However, the Petitioner would advice the U.S. Supreme Court to review and examine Petitioner's Original Motion to Supplement the Record because according to the District Court(clerk) Petitioner did not file Exhibits entered as evidence to Oppose the U.S. Memorandum and Application for Order. See Petitioner's Original Motion to verify if all exhibits entered as evidence are in the Honorable Court of Appeals Records filed by the Petitioner on September 18, 2001. See also, Petitioner's Appendix on the Petitioner's Petition for Writ of Certiorari (Appendix E).

Wherefore, the Petitioner seeks 5 million dollars because all of the Named Defendants in the instant matter **did not follow the principle enunciated by the Fifth Circuit Court of Appeals in the case Sears V. United States, 343 F.2d 139 (1965).**

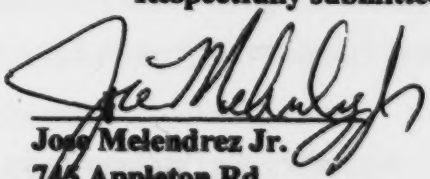
Consequently, **the Petitioner would have never been put in prison for Conspiracy with Guadalupe Garza and said others, and therefore, Petitioner SUSTAINS Mental Anguish, Stress, Emotional Distress, and Loss of Liberties SINCE June 6, 1996 thru the Present date and further FUTURE supervised release because of Defendants Moses Pena, Larry Leon, Francis E. Seib, Arnoldo Ramos, and Tony Quintanilla's "Intentional", "Deliberate", and "Reckless Conduct" that "CAUSED THE PETITIONER"S INJURIES MENTIONED HEREIN".**

CONCLUSION

BASED ON THE FOREGOING, Petitioner respectfully requests the U.S. Supreme Court to **GRANT** the Petitioner's Petition for Writ of Certiorari. If errors in the law were committed by the Fifth Circuit Court of Appeals, in essence, Petitioner respectfully requests the U.S. Supreme Court to **REVERSE** the U.S. Court of Appeals (Fifth Circuit) **DECISION** and **remand the case back with instructions to the District Court.**

DATED: July 1, 2002

Respectfully submitted,



Jose Melendrez Jr.
746 Appleton Rd.
Menasha, WI 54952

In Pro Se

CERTIFICATE OF SERVICE

This is to certify that a true copy of the Petitioner's Jose Melendrez Jr's., **"Reply Brief"** was mailed on the date indicated below to the following persons:

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Attorney for Appellee:
Arnoldo Ramos

The original and 40 copies of the same material have been mailed by U.S. Postal Service and Certified Returned Receipt on the date indicated below to the Honorable Clerk of Court for the Supreme Court of the United States.

Dated: July 1, 2002

Jose Melendrez Jr.

IN PRO SE